

2012 WL 1466046 (Idaho) (Appellate Brief)
Supreme Court of Idaho.

STATE OF IDAHO, Plaintiff-Respondent,
v.
Woodrow John GRANT, Defendant-Appellant.

Nos. 38325, 38326, 38327.

April 17, 2012.

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock
Honorable Robert C. Naftz District Judge

Reply Brief of Appellant

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*1 STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Grant argued that the Supreme Court denied him due process and equal protection when it denied him access to a transcript of a jurisdictional review hearing on appeal. Additionally, Mr. Grant argued that the district court erred when it denied defense counsel's motion to withdraw and admitted the victim's full impact statement. Mr. Grant also argued that the consecutive nature of his sentence is excessive and the district court abused its discretion when it denied his [I.C.R. 35](#) motion.

In response, the State argued Mr. Grant was not denied due process and equal protection because the judge who presided over the jurisdictional review hearing was not the same judge who presided over the probation violation hearing and the [I.C.R. 35](#) hearing. (Respondent's brief, p.6.) The State also argued that Mr. Grant failed to preserve the issue of whether the district court erred in denying counsel's motion to withdraw (Respondent's Brief, pp.11-12), that Mr. Grant has relied on an inapplicable death penalty case in support of his victim impact statement issue (Respondent's Brief, pp. 18-23), and that the district court made appropriate sentencing determinations. (Respondent's Brief, pp.23-30.)

Mr. Grant is filing a Reply Brief to withdraw his due process and equal protection argument. Mr. Grant will also address the arguments presented in the State's Respondent's Brief. Additionally, this brief will clarify that Mr. Grant did not shoot Richard Lattimer in the face and chest.

*2 Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Grant's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

*3 ISSUES

1. Did the Idaho Supreme Court deny Mr. Grant due process and equal protection when it denied his Motion to Augment with the transcript of the jurisdictional review hearing? ¹

2. Did the district court err when it failed to grant defense counsel's motion to withdraw?

3. Did the district court error in err when it admitted the victim's impact statement?

4. Did the district court abuse its discretion when it ordered Mr. Grant's sentence in the 2005 case to run consecutively with the sentences in the 2009 cases?

5. Did the District Court abuse its discretion when it denied Mr. Grant's [Idaho Criminal Rule 35](#) Motion for a Reduction of Sentence in light of Mr. Grant's continuing family support? ²

***4 ARGUMENT**

I

The District Court Erred When It Failed To Grant Defense Counsel's Motion To Withdraw

A. Introduction

The State argues that Mr. Grant “waived” the district court's disposition of the motion to withdraw when he entered into an unconditional guilty plea. (Respondent's Brief, pp.11-12.) Contrary to the State's assertion, the Idaho Court of Appeals has implicitly recognized in *State v. Trefren* 112 Idaho 812 (1987), that a guilty plea does not waive a claim that trial counsel had a conflict of interest.³ Moreover, a complete communication breakdown between Mr. Grant and his trial counsel undermines the guilty plea, in that it cannot be knowing, intelligent, and voluntary if he could not communicate with his attorney before entered his plea.

Additionally, the State cited *State v. Smith*, 130 Idaho 450 (Ct. App. 1997), for the proposition that a district court need not provide the defendant a full and fair opportunity to present the facts pertaining to an alleged conflict when defense counsel files a motion for substitute counsel. (Respondent's Brief, pp.13-16.) Mr. Grant argues that the State misstates the holding in *Smith* because that case was dealing with a public defender's *5 motion to withdraw based on his client's desire to hire private counsel and not a request for substitute court appointed counsel based on a conflict of interest.

B. The District Court Erred When It Failed To Grant Defense Counsel's Motion To Withdraw

1. Mr. Grant's Unconditional Guilty Plea Did Not “Waive” His Ability To Challenge The District Court's Disposition Of His Motion To Withdraw

The State asserts that Mr. Grant's motion to withdraw as counsel was not preserved pursuant to a conditional plea agreement and, therefore, cannot be raised on appeal. (Respondent's Brief, pp.11-12.) While Mr. Grant agrees with the general proposition that a valid plea agreement waives many issues, the State cited to no authority specifically stating that a valid guilty plea will waive the right to counsel.

Moreover, there is case authority, which implicitly contradicts the State's assertion. In *Trefren*, *supra*, Mr. Trefren's counsel filed a motion to withdraw, wherein revealed that he had recently been appointed as a prosecuting attorney and asserted his defense of Mr. Trefren constituted a conflict of interest. *Id.* at 813. Thereafter, Mr. Trefren entered a guilty plea; however, the opinion does not address whether it was a conditional or an unconditional plea. *Id.* at 813-814. On appeal, Mr. Trefren raised the conflict of interest issue and the Court of Appeals addressed the merits of Mr. Trefren's claim. *Id.* at 814. Therefore, the Idaho Court of Appeals has implicitly held that a guilty plea does not waive a claim that trial counsel had a conflict of interest.

Additionally, in *State v. Peck*, 130 Idaho 711 (Ct. App. 1997), Mr. Peck made various claims throughout the proceedings that he was dissatisfied with his public defenders. *Id.* at 712. In one of those instances, he filed a pro se motion requesting substitute counsel prior to the entry of plea hearing. *Id.* at 712. At the change of plea *6 hearing, Mr. Peck told the district court that he had worked out the problems he had with his public defender. *Id.* Thereafter, “[t]he court accepted the guilty plea and set a date for a sentencing hearing.” *Id.* On appeal, Mr. Peck argued that the district court should have held a hearing and inquired into the reasons Mr. Peck was dissatisfied with his public defender. *Id.* at 713. The Idaho Court of Appeals ruled that Mr. Peck's claim regarding his request for substitute counsel was moot because Mr. Peck told the district court that he had resolved the problems he had with his public defender. *Id.* While the Idaho Court of Appeals was not specifically addressing the question of

whether Mr. Peck's guilty plea functioned as a waiver of his motion requesting substitute counsel, the fact that the Court ruled on the merits of his motion on appeal functions as an implicit holding that he did not waive the issue.

Additionally, this issue should not be waived upon the entry of an unconditional guilty plea, because a defendant's inability to communicate with his/her attorney undermines the validity of the plea. See *State v. Manzanares*, --- P.3d ---, 2012 WL 29344 * 7 (Idaho 2012) (“Ordinarily, a plea of guilty, if voluntarily and knowingly made, is conclusive as to the defendant's guilt and waives all non-jurisdictional defects in prior proceedings against the defendant.”). The United States Supreme Court has recognized that “[a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system” and “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights that he may have.” *United States v. Cronin*, 446 U.S. 648, 653-654 (1984) (internal citations and footnotes omitted). As such, If Mr. Grant was going to waive his right to counsel that waiver must have been knowing, intelligent, *7 and voluntary. However, Mr. Grant was not expressly asked if he wanted to waive his right to counsel during the plea colloquy.⁴ Therefore, he did not waive the right to counsel. Moreover, if Mr. Grant could not communicate with his attorney, that undermines his right to counsel during the plea negotiations, which functions as an independent reason to question the validity of his guilty plea.

In sum, there is case law which implicitly holds that the entry of an unconditional guilty plea does not function as a waiver of Mr. Grant's motion requesting substitute counsel. Additionally, Mr. Grant's guilty plea was not knowing, intelligent, and voluntary if he could not communicate with his attorney.

2. The Holding Of *Smith* Is Not Applicable To The Facts Of This Case Because The District Court Interpreted Mr. Grant's Motion To Withdraw As A Request For Substitute Court Appointed Counsel

The State argues that a different procedure may be employed in instances where defense counsel, as opposed to the defendant, files a motion requesting substitute court appointed counsel. (Respondent's Brief, p. 14.) Specifically, the State argues that when defense counsel files the motion requesting substitute counsel, the district court does not have to afford the defendant a full and fair opportunity to present facts in support of the attorney's motion. (Respondent's Brief, pp.13-14.)

In support of this argument, the State cites to *Smith*. (Respondent's Brief, pp.14-16.) In *Smith*, the defendant wrote a letter to the district court. *Id.* at 452. The letter was provided to the defendant's public defender, who filed a motion to withdraw as counsel. *Id.* At the hearing held on the motion, defense counsel argued that he should *8 be allowed to withdraw because the defendant wanted to retain private counsel. *Id.* The defendant did not dispute the public defender's characterization of his position. *Id.* “In consideration of speedy trial limits raised by the prosecuting attorney, the district court denied counsel's motion to withdraw, requiring the public defender to remain as counsel of record until Smith made arrangements for new counsel to represent him at the trial as scheduled.” *Id.*

The defendant ultimately appealed and argued that “the district court erred in failing to appoint new counsel after Smith expressed dissatisfaction with the public defender assigned to his case.” *Id.* The Court of Appeals cited to the following authority and employed the following analysis when affirming the district court:

An indigent defendant has a right to *court-appointed counsel*, including the right to effective assistance of counsel. Absent extraordinary circumstances, the right to counsel does not include the right to *appointed counsel* of the defendant's choice. A trial judge may, in his discretion, *appoint new counsel*, on request, for “good cause.”

As in *Clayton*, *supra*,⁵ *Smith* has not claimed that the public defender was ineffective, but he argues that the district court should have conducted a more detailed inquiry into the source of the attorney-client conflict as set forth in *Smith*'s letter to the district court. *The district court did not interpret Smith's letter as a motion for substitution of new appointed counsel and, thus, did not engage in a “good cause” analysis.* Furthermore, the district court's ruling did not foreclose *Smith*'s opportunity to retain private counsel and to present a substitution of counsel. Having reviewed the explanation given by the public defender

at the hearing on the motion to withdraw, and *in light of the ambiguity of Smith's letter*, we conclude that the district court did not abuse its discretion in denying the motion.

Id. at 452-453. (citations omitted) (underlined and bold emphasis added). Contrary to the State's assertion, *Smith* does not stand for the proposition that in instances when *9 defense counsel files the motion requesting substitute counsel, the district court does not have to afford the defendant a full and fair opportunity to present facts in support of the attorney's motion. (Respondent's Brief, pp.13-14.) The State's focus on the person that files the motion is misplaced, because, in *Smith*, the true issue was the fact that the defendant's letter and the attorney's motion was interpreted as a request for private counsel, not substitute court-appointed counsel. Accordingly, in *Smith*, the district court was not required to engage in the "good cause analysis" because it interpreted the motion as a request for private counsel. Moreover, the district court did not prevent the defendant from hiring private counsel. The district court merely had the public defender remain on the case until the defendant could hire private counsel. The district court did this because it did not want to delay the case in light of the prosecutor's comment about the defendant's speedy trial rights. In this case, there are no facts which indicate that Mr. Grant wanted to hire private counsel. (R., Vol. II, pp.230.) The issue was whether the district court would appoint a new public defender (R., Vol. II, pp.230), and therefore, the district court was required to engage in an adequate inquiry into the nature of the alleged conflict between Mr. Grant and his trial counsel.

In sum, the State relies on mere factual coincidences between this case and *Smith*, and then argues that *Smith* is controlling. However, the State ignores the fact that *Smith* was dealing with a request for private counsel and a request for new court appointed counsel. As such, the State's reliance on *Smith* is misplaced and its holding is not applicable to Mr. Grant's request for new court appointed counsel.

*10 III

The District Court Erred When It Admitted The Victim's Impact Statement

A. Introduction

In his Appellant's Brief, Mr. Grant relied on, [State v. Payne, 146 Idaho 548 \(2008\)](#), a death penalty case, when he argued that the district court erred when it allowed a victim impact statement which included characterizations of the crime, the defendant, and the appropriate sentence. (Appellant's Brief, pp.26-33.) The State responded by arguing that the decision to impose the death penalty is a jury issue, while in non-capitol cases sentencing is performed by a judge. (Respondent's Brief, pp.18-23.) Therefore, the States argues the restrictions in victim impact statements in death penalty cases are imposed so the jury does not arbitrarily impose the death penalty and that risk is not present when a judge imposes a sentence in a non-capitol case. (Respondent's Brief, pp.18-23.) However, the State's reliance on the distinction between sentences imposed by a jury versus a judge has no bearing on the standards set forth in *Payne*, because the sentence in that case was imposed by a judge.

B. The District Court Erred When It Admitted The Victim's Impact Statement

The State's primary argument in response to Mr. Grant's request to extend the holding of *Payne* to non-death penalty cases is based on the fact that juries make the decision to impose death, while judges impose sentence in non-death penalty cases. (Respondent's Brief, pp.26-33.) The State's distinction is meaningless because Darrell Payne was sentenced to death by a judge.

*11 In *Payne*, "[t]he district court proceeded to sentence Payne pursuant to Idaho's former death penalty statute, [I.C. § 19-2515 \(2001\)](#)." [Payne, 146 Idaho at 557](#). After a three day sentencing hearing, the district court, not a jury, sentenced Mr. Payne to death. *Id.*

The fact that a judge decided to impose the death penalty is important because it undermines the State's argument that the limitations for victim impact statements contained in Payne should not be applied to non-capital cases because Idaho judges will be able to ascertain the relevancy and reliability of the information before them at sentencing. (Respondent's Brief, p.21.) However, the Payne decision functions as a limit to that presumption, in the specific context of a victim impact statements.

In sum, the State's purported distinction between capital and non-capital cases is specious because a judge imposed the death penalty in Payne.

IV.

The District Court Abused Its Discretion When It Ordered Mr. Grant's Prior Sentence In The 2005 Case To Run Consecutively To The Sentences In The 2009 Cases

A. Introduction

In the 2005 aggravated battery case, Mr. Grant admitted that he fired one bullet into the ground and that bullet happened to ricochet and hit the victim in the leg. In the Respondent's Brief, the State asserts that Mr. Grant shot the victim multiple times, and hit the victim in the face and chest, requiring over 500 stitches. (Respondent's Brief, pp.1, 25.) This assertion is not supported by the record and is contradicted by the district court's factual findings.

***12 B. The District Court Abused Its Discretion When It Ordered Mr. Grant's Prior Sentence In The 2005 Case To Run Consecutively To The Sentences In The 2009 Cases**

The State described the 2005 offense as follows:

[Mr. Grant] was first convicted of aggravated battery in 2006. (R., vol. I pp. 122-24.) He explained that he was involved in a large fight and described what occurred: someone ran "over to them with a metal pipe and starts swinging [sic] it so I run [sic] over toward them and get rushed by like 4 or 5 guys than I pulled the gun out and pointed it to the ground and pulled the trigger, everyone stopped fightin [sic] and started running..." (2006 PSI, p.4.) *The bullets ricocheted and hit the victim in the head in the chest, requiring over 500 stitches.* (PSI, p.5.) [Mr. Grant] admitted that he was under the influence of alcohol at the time of the shooting.⁶

(Respondent's Brief, p.25 (emphasis added)).

The State's version of events confuses Richard Lattimer who sustained [head injuries](#) from a metal pipe and a wooden bat with the injuries Tyler Solomon sustained from the gun wound. In the PSI, Richard Lattimer stated that he walked outside of his home and "Mr. Nichols" had a wooden bat and Billy G. had a black colored pipe. (PSI, p.2.) Richard Lattimer said that Mr. Nichols, the man with the wooden bat, hit him in the head. (PSI, p.2.) Mr. Lattimer, then turned around and Mr. Nichols "hit him again in the front left side of his head." (PSI, p.2.)

A different witness, Ricky Lattimer,⁷ stated that Richard Lattimer was struck in the head with a bat. (PSI, p.3.) Ricky Lattimer stated the same guy struck Richard two ***13** more times. (PSI, p.3.) Ricky Lattimer said he heard a gunshot then saw a guy strike Richard Lattimer in the head with a black pipe. (PSI, p.3.) Richard Lattimer received over 500 stitches for the laceration to his head. (PSI, p.2.)

Mr. Grant's victim was Tyler Solomon, not Richard Lattimer. (PSI, p.4.) In the defendant's version of the events, Mr. Grant states that "TJ Soloman did not deserve what I did to him." (PSI, p.4.) One of the police reports included in the clerk's record stated that "Richard Lattimer had been struck in the head with an aluminum baseball bat⁸ and that TJ Solomon had been shot

with a ... handgun.” (R. Vol. I., p.22.) Another police report stated that “the bullet entered the back of [Mr. Solomon's] left thigh and exited the inside of his left thigh. The bullet then entered the interior portion of his right thigh, and the bullet lodged just under the skin in the outside of his right thigh.” (R., Vol. I, p.43.) The inference which can be drawn from the foregoing is that Mr. Solomon was hit by one bullet which injured his leg.

The district court's factual findings also support Mr. Grant's version of events. At the change of plea hearing, Mr. Grant admitted to firing one bullet into the ground that ricocheted and hit the victim in the leg. (Tr., p.40, Ls.2-18.) At the sentencing hearing, and after reviewing the 2006 PSI, the district court made the following factual findings:

I'm considering the nature of your offense, in other words, what you did. Now... I'm not minimizing what you did here, Mr. Grant, but it's not like you just started firing into a crowd and dropping bodies all over the place.

You shot - - totally stupid - - you shot at the ground. I mean - - and, you know, predictably, the ricochet hit this fellow. It could have hit more than one. *To your benefit, you didn't shoot anymore* and the crowd *14 dispersed... when they saw somebody shooting a gun, everybody took off.

THE DEFENDANT: Yes, sir.

THE COURT: *And you have been forthright and honest with the Court*, admitting what you did.

The prosecutor is certainly right, this is a serious crime, and in looking at the facts here, again, you didn't start blasting away at the crowd or that one particular person, *you shot at the ground, and I think is an attempt - stupidly - - to stop what was going on.*

(Tr., p.69. L.6 - p.70, L.12 (emphasis added)). According to the district court, Mr. Grant shot at the ground and “didn't shoot anymore.” From this statement it can be inferred that the district court concluded that Mr. Grant fired one shot. Moreover, the district court characterized Mr. Grant's decision to fire the shot as an attempt to stop the fight, and not attempt to shoot a person. The district court also stated that it believed Mr. Grant's admission that he fired one gun shot into the ground which ricocheted and hit the victim in the leg.

The State's assertion that Mr. Grant fired multiple shots into the ground, which hit the victim in the head and chest, is based on a complete misunderstanding of the basic facts, and confuses Richard Lattimer's injuries with Mr. Solomon's injuries. Further, the district court found that Mr. Grant was a peacemaker and intended stop the fight when he fired the gun and that decision caused the crowd to disperse. So, while accidentally injuring Mr. Solomon, he might have actually prevented Mr. Lattimer from sustaining any further harm.

*15 CONCLUSION

Mr. Grant respectfully requests that this Court either remand this action to hold further proceedings regarding the inquiry into the breakdown in attorney client relationship or vacate his conviction and sentence and restore his trial rights. In the event this Court determines that the district court erred in admitting the victim impact statement, Mr. Grant requests that this Court vacate his sentence and remand this matter to the district court. Alternatively, Mr. Grant requests that this Court order his sentences in the 2009 cases to run concurrently with his sentence in the 2006 case.

Footnotes

- 1 As stated above, this issue is being withdrawn from this Court's consideration. As the State accurately points out (Respondent's Brief, p.6), the judge presiding over the probation revocation hearing and the [rule 35](#) hearing was not the same judge who presided over the jurisdictional review hearing, and therefore, Mr. Grant's claim that the judge could have relied on its memory of the jurisdictional review hearing is not supported by the record. (R., Vol. I, pp.126-127; R., Vol. II, pp.396-400, 405-406.)

- 2 This issue is not being addressed in this brief.
- 3 Mr. Grant recognizes that in *State v. Andersen*, 2011 Unpublished Opinion No.573 (August 5, 2011) the Idaho Court of Appeals held, while discussing *Trefren*, that an unconditional guilty plea does waive a defendant's assertion that counsel was conflicted. Since this is an unpublished opinion and not binding authority, Mr. Grant argues, in reliance on *Trefren*, that an unconditional guilty does not "waive" the ability to raise the allegations of a conflict on appeal. See Supreme Court Operating Rule 15(f) "If an opinion is not published, it may not be cited as authority or precedent in any court.").
- 4 The district court did ask Mr. Grant if he was satisfied with his attorney and Mr. Grant answered affirmatively. (Tr., p.136, L.19 - p.137, L.4.)
- 5 *State v. Clayton*, 100 Idaho 896 (1980).
- 6 While the State implicitly addresses Mr. Grant's consumption of alcohol as an aggravating factor, this can be considered as a mitigating factor, because his alcohol consumption could have inhibited his ability to fully comprehend the dangerous nature of his actions, which in turn reduced his culpability. *State v. Osborn*, 102 Idaho 405, 414 (1981). This mitigating factor is consistent with the district court's characterization of Mr. Grant's offense as being a stupid way to stop the fight. (Tr., p.69. L.6 - p.70, L.12
- 7 Ricky Lattimer appears to be Richard Lattimer's brother. (PSI, pp.2-4.)
- 8 While the aluminum baseball bat is not consistent with the wooden bat and the metal pipe, it is consistent with the other witness that said Richard Lattimer was hit in the head with a bat shaped weapon.

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